

Rule 5, Ariz. R. Crim. Proc.

PRELIMINARY HEARINGS – Magistrate’s power is limited in evidentiary issues.....Revised 12/2009

A magistrate is constrained as to his ability to deal with evidentiary issues in a preliminary hearing. Rule 5.3(b), Ariz. R. Crim. P., provides, “Rules or objections calling for the exclusion of evidence on the ground that it was obtained unlawfully shall be inapplicable in preliminary hearings.” Therefore, at a preliminary hearing a magistrate **may not** grant a motion to suppress evidence. “It is clear ... that a magistrate at a felony preliminary hearing has no jurisdiction to suppress evidence based on an unlawful search and seizure. The power to suppress evidence seized as a result of an unlawful search and seizure rests exclusively with the superior court.” *State v. Joachim*, 202 Ariz. 566, 569, ¶ 13, 48 P.3d 516, 519 (App. 2002), *internal citations omitted*. That is, whether evidence should be admitted at trial is a question to be determined by the trial court, not by the magistrate at the preliminary hearing. See *Comment to Rule 5.3(b), Ariz. R. Crim. P.*

While a defendant may object to the admission of certain evidence in a preliminary hearing, the defendant may still be bound over based on the totality of the evidence, despite the defendant's objection. As the Court of Appeals noted in *State v. Lenahan*, 12 Ariz. App. 446, 471 P.2d 748 (1970), overruled on other grounds by *State v. Sample*, 107 Ariz. 407, 489 P.2d 44 (1971), overruled on other grounds by *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978), a

defendant may be properly bound over even though certain evidentiary items may be questionable and ultimately may be inadmissible at trial, when the sheer weight of the evidence available indicates that the defendant is most likely guilty of the crime charged. *Lenahan*, 12 Ariz.App. at 449, 471 P.2d at 751.